No. 15302

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILTON C. CHARLES,

Appellant,

vs.

WILLIAM N. BOWIE, JR., as Trustee in Bankruptcy of American Aeronautics Corporation, Bankrupt,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

MARVIN GROSS and
ANTHONY T. CARSOLA,
321 South Beverly Drive,
Beverly Hills, California,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles, Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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Jurisdiction.

Appellant Milton C. Charles requested a turn-over order as against appellee Trustee in Bankruptcy of American Aeronautics Corporation. After an unfavorable order, appellant had same reviewed before the District Court for the Southern District of California, Central Division, where said order was affirmed.

This appeal is brought under Title 28, United States Code, Section 1291, as being within the usual appellate jurisdiction of this court in actions of law.

Statement of the Case.

Appellant Milton C. Charles, a Certified Public Accountant [Tr. p. 23] was hired in July, 1954, to do the accounting for American Aeronautics Corporation by Gordon D. Strube, President of American Aeronautics Corporation, now a bankrupt corporation [Tr. p. 23].

In discussing the fees, the two men decided that inasmuch as the books had been neglected for some time [Tr. p. 20] and were in need of considerable work [Tr. p. 24], a *per diem* basis was most appropriate [Tr. p. 24].

In order to prepare the anticipated claim for tax refund, appellant necessarily had to restore the books to a reasonably workable condition [Tr. p. 28]. Appellant so worked until the beginning of 1955, at which time he approached Mr. Strube in an attempt to obtain or arrange for payment for his past and future service [Tr. pp. 24, 30]. At this time appellant and Mr. Strube discussed the services already rendered by appellant [Tr. p. 30], the terms and object of the employment, and agreed that appellant's employment would be ended upon his completing the necessary accounting to allow the books to be closed, then preparing the final statements [Tr. pp. 26, 30].

As a result of this meeting and conversation, Mr. Strube prepared Appellant's Exhibit 1, signed it, and delivered it to appellant on or about February 15, 1955 [Tr. pp. 20-21].

Pursuant to his last conversation with Mr. Strube and to Exhibit 1, appellant continued working on the books of the corporation [Tr. pp. 25-26], putting them in order and eventually filing the claim for refund [Tr. p. 28].

All in all, appellant put in over forty (40) actual working days on the books of the corporation [Tr. p. 26], two or three of which were spent in filling out the claim itself [Tr. p. 28]. Appellant testified that $100.00 per day was a reasonable charge for his services [Tr. p. 27].

Appellant received no consideration whatever for any of his services other than said written assignment, being Appellant's Exhibit 1 [Tr. pp. 21, 28].

Appellant procured an Order to Show Cause why the appellee Trustee in Bankruptcy should not turn over to appellant the $4,000.00 pursuant to said assignment [Tr. p. 4]. The Referee in Bankruptcy recognized said assignment only to the extent of $300.00 [Tr. p. 8]. Thereafter appellant filed his petition to review said order before the District Court, which petition was denied and the order of the Referee affirmed [Tr. p. 14]. This appeal followed.

Although it does not appear on the face of this record, the records before the Referee in Bankruptcy did show that the claim for tax refund to which Exhibit 1 refers did in fact amount to a sum in excess of $9,000.00, which sum had been received by the corporation.

Assignments of Error.

Appellant submits that the order of the Referee in Bankruptcy allowing the assignment only to the extent of $300.00 is contrary to law and is not supported by the evidence for the following reasons:

1. NEITHER THE PAROL EVIDENCE RULE NOR THE RULE OF INTEGRATION APPLIES TO THE ASSIGNMENT HEREIN.

2. EVEN IF THE RULES OF PAROL EVIDENCE AND INTEGRATION APPLY, THE FACTS OF THIS CASE FALL WITHIN ANY ONE OF SEVERAL EXCEPTIONS THERETO.

3. THE TRUE INTENT OF THE PARTIES AND OF THE ASSIGNMENT WAS TO COMPENSATE APPELLANT FOR ALL SERVICES RENDERED.

4. IT IS NOT NECESSARY TO REFORM THE ASSIGNMENT.

5. THERE IS NO EVIDENCE AS TO THE AMOUNT OF WORK PERFORMED BY APPELLANT AFTER THE DELVERY OF THE ASSIGNMENT.

ARGUMENT.

In all fairness to the Referee in Bankruptcy, it is conceded that wide latitude was permitted appellant in the introduction of oral testimony. However, it is submitted that the Referee's conclusion that this written assignment, Appellant's Exhibit 1, could not be explained or elaborated upon by way of extrinsic oral evidence [Tr. p. 33] is not supported by either the facts or the law of this case. Actually, not one of the facts herein is in dispute, so that of necessity the sole question involved are those of law. Simply stated, the ultimate issue here is whether or not this written assignment may be construed in the light of extrinsic oral testimony.

I.

Neither the Parol Evidence Rule nor the Rule of Integration Applies to the Assignment Herein.

It is conceded that the parol evidence rule and the rule of integration, where applicable, preclude the presentation of oral testimony to vary the terms of a written agreement. However, it is submitted that neither of these rules apply to the instant case. The basis of both of these rules is that oral testimony cannot alter the terms of an agreement which embodies all of the terms and conditions of prior negotiations and discussions. But these rules do *not* apply where the instrument does *not* purport to be a complete statement of the agreement of the parties.

Love v. Culvan, 87 Cal. App. 2d 608, 614;

10 *Cal. Jur.* p. 918.

In the instant case the assignment was obviously an informal writing, merely a memorandum, and not a formal agreement embodying all of the terms and agree-

ments of the parties. This conclusion is inescapable in view of the complete absence of details, conditions, promises, times or any of the other usual clauses found in formal agreements. Under these facts there is no valid reason whatever for the exclusion of oral testimony or for the failure of the Referee to construe the assignment in the light of the oral testimony.

II.

Even if the Rules of Parol Evidence and Integration Apply, the Facts of This Case Fall Within Any One of Several Exceptions Thereto.

1. The use of certain words or phrases without explaining the meaning of same in detail will *necessitate* the taking of extrinsic evidence to clarify the same. See the case of *Wacha v. Wacha,* 11 Cal. 2d 322, wherein the word "transaction" was allowed to be explained by parol evidence.

Civ. Code, Sec. 1647;
Civ. Code, Sec. 1649.

In the instant case the assignment expressly states that appellant ". . . may consider this an assignment of whatever refund we receive as a result of your services to the extent of $4,000.00 for such services."

Further, the assignment refers to the "necessary accounting" to be performed by appellant, and this phrase is inherently in need of the extrinsic evidence to explain what the parties considered as "necessary accounting." Certainly, reasonable persons unfamiliar with the surrounding circumstances could have different opinions as to the meaning of "necessary accounting."

2. ". . . When the language employed is fairly susceptible of either one of two constructions contended

for, extrinsic evidence may be resorted to for the purpose of explaining the intention of the parties . . ."

MacIntyre v. Angel, 109 Cal. App. 2d 425, 430.

3. In the case of *Smetherham v. Laundry Workers Union,* 44 Cal. App. 2d 131 at 139, the court stated:

> ". . . Where one construction would make the contract unusual or extraordinary, courts are to disregard such construction if the contract may reasonably be subject to a construction which is fair and just . . ."

To interpret the contract to read that appellant is to be paid $4,000.00 for forty hours' work, or merely for filling out the claimed refund, is indeed an unusual or extraordinary interpretation, and the same should be disregarded.

4. The phrases "forty hours" and "$4,000.00" are patently inconsistent and repugnant clauses. To hold that appellant is to receive $4,000.00 for forty hours of work does, indeed, result in an "absurdity." As stated in the case of *Jackson v. Puget Sound Lumber Co.,* 123 Cal. 93, 100:

> "But the language of a contract governs its interpretation only so far as it is clear and explicit and *does not involve an absurdity* (Civil Code, Section 1638). Language involving an absurdity is rejected, and so is any phrase or clause which is inconsistent with the object and intention of the parties. (Civil Code, Sections 1650, 1652, 1653)." (Emphasis added.)

In the instant case, any clause or construction inconsistent with the mutual intention of the parties, which was to reimburse appellant for *all* services rendered, should be rejected and disregarded, in accordance with the intent of both of the parties to the transaction.

III.

The True Intent of the Parties Was to Compensate Appellant for All Services Rendered.

1. In determining the mutual intentions of the parties hereto, the attention of this Court is directed to the case of *Balfour v. Fresno C. & I. Co.,* 109 Cal. 221, 226, wherein the Court stated:

> ". . . For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made, but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversation between and declarations of the parties during the negotiations at and before the time of the execution of the contract may be shown. (Cases cited.)"
>
> *Civ. Code,* Sec. 1636.

2. In the case of *Universal Sales Corp. v. California etc., Mfg. Co.,* 20 Cal. 2d 751, 761, the Court stated:

> ". . . As an aid in discovering the all important element of intent of the parties to the contract, the trial court may look to the circumstances surrounding the agreement . . . including the object, nature and subject matter of the writing . . . and the preliminary negotiations between the parties . . ."
>
> *Code Civ. Proc.,* Sec. 1860.

The Findings of Fact and Conclusions of Law of the Referee herein found as a fact that the assignment was intended to be in an amount "which would reasonably compensate said petitioner (appellant) for personal services to be performed by him in connection with doing the *necessary accounting for* and preparing and filing the income tax return required in order to obtain the said claim

for refund." (Emphasis added.) [Tr. pp. 6-7.] Clearly, neither the income tax return nor the claim for refund could be filed until the "necessary accounting" had been performed by appellant to arrange and bring the books up to date. The assignment was not intended to distinguish between services rendered by appellant in preparing the books as opposed to services rendered by appellant in filling out the claim for refund. Yet this finding is the basis of the order of the Referee herein, which finding is wholly without evidentiary support. Rather, the assignment was intended to compensate appellant for doing the entire job, *i. e.,* the "necessary accounting" entailed in preparing the books *and* the filing of the claim for refund which, pursuant to the understanding, would satisfy appellant's obligation under his contract of employment.

Concerning this point, appellant testified on pages 25-26 of the Transcript as follows:

> "Q. Now, sometime in the early part of 1955 after you had performed some of these services for the American Aeronautics Corporation, did you have a discussion with Mr. Strube relative to payment for your services? A. As a matter of fact, it seems to me it was in the latter part of 1954. I believe it was sometime in December. It may have been shortly before the end of the year or shortly thereafter, and I had said, 'Mr. Strube, you realize fully—you have seen me here practically every day. You realize fully that I have put in a great deal of time and now approximately six months have elapsed and I haven't received one dime for my fee,' and I said, 'Of course, I don't pay my rent on that basis and I think some consideration should be made.'
>
> Q. (By Mr. Gross): Now, after that discussion with Mr. Strube, were you delivered by him personally this document which is Petitioner's Exhibit 1?

A. Yes, that is it. That was a document that was delivered by Mr. Strube personally."

Page 26:

"A. . . . I had told Mr. Strube after he had made this arrangement with me, or before then even, I said, 'If you do what you propose to do, I would be very happy to continue, and even if the services and time will amount to a greater sum than I estimated, I will bring it through to a conclusion so that the books will be in such shape that you will have your closing at the end of the year and prepare any statements or anything else you may need.' "

On this same point, Mr. Strube testified at page 30 of the Transcript as follows:

"A. Well in the discussion that I had with Mr. Charles regarding his fees, we had been discussing the amount of work that he had accomplished up to this point and I was interested to know what sort of fees he had built up as a result of his work, and he mentioned at the time that if he continued to finish out the work that he had started and file these income tax returns that it would involve a total of about 40 days of work to go through and complete it."

At this conversation shortly before the assignment, the parties discussed the services already performed by appellant, the terms of employment and the compensation due appellant. It was at this conversation that the parties decided that instead of continuously "keeping the books," appellant's obligation under the contract of employment would be discharged if he prepared the books for closing ("necessary accounting") and filed the necessary statements (claim for refund). In view of the surrounding circumstances, the negotiations and discussions, it is clear

why the assignment referred to "services in connection with claim for refund." Yet the Referee failed to construe said assignment in accordance with the mutual intention of the parties as evidenced herein.

3. The construction given the assignment by the acts and conduct of the parties is entitled to great weight, and will, when reasonable, be adopted and enforced by the courts.

Whalen v. Ruiz, 40 Cal. 2d 294, 301.

The parties to the assignment clearly intended said assignment to reimburse appellant for all services performed on behalf of the bankrupt corporation, and yet the Referee wholly failed to construe said assignment in accordance with the interpretation placed thereon by the parties themselves.

It is submitted that the construction placed upon the assignment by the parties thereto, which construction is evidenced by their conduct and declarations before and after the assignment, is a fair and reasonable interpretation, *i. e.,* that the terms "necessary accounting" and "such services" were intended to cover *all* of the services performed by appellant for the bankrupt corporation. Certainly, "necessary accounting" would include the *preparation* of the *books.* Neither a return nor a claim for refund could be filed until the books had been straightened out and brought up to date, especially where, as here, the books were in a neglected condition. As appellant testified on page 28 of the Transcript:

"The Witness: Well, the claim for refund itself?

The Referee: That is what I am talking about.

The Witness: That was the smallest part. The claim for refund in and of itself was probably only a few days.

The Referee: How many days?

The Witness: Probably two or three itself. The big part of the job was to get the books in shape so we could have the information."

4. Contrary to legal principles, the Referee failed to interpret the uncertainty created by the assignment against the *maker* thereof, the bankrupt. It is fundamental that all uncertainties or ambiguities contained in a written instrument are resolved against the maker of that instrument.

Taylor v. J. B. Hill Co., 31 Cal. 2d 373, 374;
Civ. Code, Sec. 1654.

5. A contract must be given a fair and reasonable interpretation under all the circumstances, rather than an unusual or extraordinary construction. The contract must be interpreted in accordance with the mutual intention of the parties at the time of contracting.

Rost v. Bryson, 118 Cal. App. 2d 489, 493.

6. "Whether or not a writing is ambiguous is a question of law, and the lower court's finding on this issue is not binding on the appellate court. (Cases cited.)"

Wagner v. Shapona, 123 Cal. App. 2d 451, 460.

IV.

It Is Not Necessary to Reform the Assignment.

The assignment expressly provides for the payment of *"$4,000.00"* for "necessary accounting," etc. Appellant is not seeking to change this figure in any way, and thus did not pray for reformation.

Further, the assignment merely recites an apparent estimate of "forty hours or more." Whether this was intended to mean "forty hours or more above what appellant has already done," or "forty days," or "forty hours or more with a maximum of forty days," or any other possible construction, is immaterial here. The sole question is whether or not appellant performed services of the reasonable value of $4,000.00, the amount specifically set forth in the assignment. The evidence is uncontroverted that he did.

Furthermore, clauses which are inconsistent with the true intent and object of the parties may be disregarded by the court. This, of course, would mean that one of the inconsistent and ambiguous phrases, "forty hours or more" or "$4,000.00 for such services," may be disregarded by the court *in accordance with the true intent of the parties.*

Civ. Code, Sec. 1640.

It is interesting to note that the Referee failed to consider the oral testimony introduced on the ground that this instrument must first be reformed and that such reformation was not within his power [Tr. pp. 31-33]. Yet the order of the Referee is in itself reformation of the instrument, causing it to read "$300.00" in the place and stead of "$4,000.00," contrary to the mutual intention of the parties. It is submitted that reformation was neither requested nor necessary, and that an order therefore is contrary to law.

V.

There Is No Evidence as to the Amount of Work Performed by Appellant After the Delivery of the Assignment.

The Referee's Certificate on Review indicates that he intended to "give effect to the assignment only to the extent of the value of the services rendered after the date of the assignment" [Tr. p. 12]. However, at the hearing the Referee had taken the position that appellant could recover only for time spent on the actual refund itself, regardless of services rendered after the date of the assignment [Tr. p. 28]. As a result the record is barren of any evidence whatever as to the amount of services rendered by appellant after the assignment, except that appellant stated generally that "I had put in the year of 1954 alone approximately 25 to 30 days all told." Certainly if appellant is entitled to compensation for all services rendered *after* the date of the assignment, the record should be clarified by the taking of further testimony on this point. Appellant should be afforded at least this opportunity, since the precise issue was never raised by the Referee at the original hearing, appellant had no reason to consider this issue at all material, and the first notice appellant had of its materiality was upon receiving a copy of the Referee's Certificate on Review some time after the hearing.

VI.
Conclusion.

As discussed above, extrinsic evidence is admissible to explain the assignment on any one of several grounds:

1. The assignment did *not* purport to be a complete statement of the obligations of the parties, and the parol evidence rule and the rule of integration are therefore inapplicable.

2. The assignment is capable of more than one interpretation.

3. "Necessary accounting" and "such services" are patently uncertain, and may be explained by extrinsic evidence.

4. The interpretation of the Referee that the assignment compensates appellant in the amount of $4,000.00 for forty hours work, results in an "absurd," "unusual" and "extraordinary" construction.

5. "$4,000.00" for "forty hours" are inherently inconsistent and repugnant clauses, in need of explanation.

Once the conclusion is reached that extrinsic evidence is admissible, it cannot be denied that the true intent of the parties and of the assignment was to compensate appellant for *all* services rendered. Such an interpretation is supported by the following facts:

1. The *surrounding circumstances* at the time of the assignment.

2. The *acts and declarations* of the parties before and after the assignment.

3. The *interpretation* placed on the assignment by the parties thereto.

4. That the assignment should be construed *against the maker* thereof, to wit, the bankrupt.

5. Any other interpretation would result in the "extraordinary" or "absurd" or "unusual" result that appellant was to be paid $4,000.00 for forty hours' labor, or $4,000.00 for merely filling out a claim for refund.

It is submitted that Referee, sitting as a Court of Equity, could and should have afforded appellant complete relief as prayed for in his original petition.

Appellant requests that the Order of the Honorable Referee be reversed and that appellee Trustee in Bankruptcy be ordered to pay to appellant the sum of $4,000.00; or, that the case be remanded to the Referee for further evidence on the point of services rendered after the assignment, with directions consistent with the principles of law discussed herein.

Respectfully submitted,

MARVIN GROSS, and
ANTHONY T. CARSOLA,
Attorneys for Appellant.